IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.4389 OF 1989

1. Hindustan Petroleum Corporation Ltd., a company registered under the Companies Act, 1956, having its registered office at 17, Jamshedji Tata Road, Bombay-400 020.
2. Messrs J.R. Mehta and Sons, Petrol Pump Dealer, Old Agra Road, Trimbak Naka, Nasik. .... Petitioners

- Versus -

1. Poona Diocessan Corporation Pvt. Ltd., Poona, a Company incorporated for charitable objects having its registered office at Bishop's House 1-B, Prince of Wales Drive, Pune-1.
2. Alloysus Lowrence Fonseca, age 41, Catholic Ashram, Trimbak Naka, Nasik, (holding General Power of Attorney for

the Corporation).

3. Fr. Shailchandra,
Aged 52 years, Catholic
Ashram, Trimbak Naka,
Nasik. .... Respondents

Shri A.K. Abhyankar for the Petitioners.
Shri P.A. Jani i/b M/s. Gagrat & Co. for
the Respondent Nos.1 and 2.

CORAM: R.M.S. KHANDEPARKAR, J.
DATED: NOVEMBER 25, 2004

ORAL JUDGMENT:

1. Heard the learned Advocates for the parties. Perused the records.

2. The petitioners challenge the decree of eviction passed by the lower Appellate Court on the ground of default in payment of rent. Though the challenge to the impugned order is on various grounds, it is not necessary to address to all the grounds and suffice to consider only one ground which goes to the root of the matter. It is the contention of the petitioners that the mandatory requirement of law relating to issuance of a notice under Section 12(2) of the Bombay Rents, Hotel

and Lodging House Rates Control Act, 1947, hereinafter referred to as "the said Act", to the lessee before the filing of the suit for eviction on the ground of default in payment of rent was not complied with by the respondents and therefore the entire proceedings for eviction of the petitioners were bad in law and for the same reason the impugned order of eviction of the petitioners from the suit premises cannot be sustained.

3. The facts in brief relevant for the decision are that by agreement dated 6-3-1961 the suit premises were allowed to be occupied by the predecessor of the petitioners on monthly rent of Rs.215/-. By a notice dated 9-11-976 the petitioners were informed by the respondents/landlords that a sum of Rs.1732.20 ps. was due from the petitioners towards the cess amount payable in respect of the suit premises in addition to the sum of Rs.16.985/- towards the arrears of rent for the period from 1-4-1970 till 31-10-1976. The said notice was replied by the petitioners on 12-12-1976 informing the respondents that the petitioners had already paid the tax dues upto 31-3-1977 to the municipality and that the petitioners were not in arrears of rent to the respondents. A detail statement of account in relation to the amount paid to the municipality as well as the rental payments was annexed to the reply dated 12-12-1976. The respondents, however, filed suit for

eviction of the petitioners in January, 1977 alleging default in payment of rent along with some other grounds for eviction of the petitioners from the suit premises. The suit was contested by the petitioners and the trial Court dismissed the suit inter alia holding that the respondents had failed to prove that the petitioners had defaulted in the payment of rent for more than six months and the appeal carried against the said judgment was allowed on the ground that the petitioners had failed to comply with their obligation under Section 12(3)(b) of the said Act.

4. While challenging the impugned order, it was submitted by the learned Advocate for the petitioners that on the day when the notice dated 9-11-1976 was issued to the petitioners, there were no arrears due from the petitioners either on account of rental amount or even in relation to the municipal taxes. Drawing attention to the copy of the statement of accounts in that regard, a copy of which was undisputedly sent to the respondents along with the reply dated 12-12-1976, the learned Advocate submitted that mere failure on the part of the respondents to encash the cheque in relation to the rental amount cannot be of any advantage to the respondents to contend that the petitioners had been in arrears of rent on the day when the notice dated 9-11-1976 was issued. Once it is not in dispute that

the amount of rent was tendered as and when it had fallen due and payable, failure on the part of the respondents to encash the cheque will not justify initiation of action for eviction of the petitioners on the ground of default in payment of rent unless perhaps the respondents had been able to plead and prove that the mode of payment of rent agreed between the parties was different from the payment by cheques. It is further submitted that the respondents did not produce any evidence on record to disclose, nor there is any finding by either of the Courts to the effect that the petitioners owed any amount more than the amount already paid by the petitioners.

5. Considering the same, there was no cause of action for the respondents to initiate the eviction proceedings on the ground of default in payment of rent, obviously therefore there was no occasion for fastening the liability upon the petitioners to comply with the provision of Section 12(3)(b) of the said Act. According to the learned Advocate for the petitioners, therefore, the entire proceedings for eviction were bad in law ab initio and yet the lower Appellate Court erred in decreeing the suit for eviction of the petitioners from the suit premises on the ground of default in payment of municipal taxes by resorting to the provision of Section 12(3)(b) of the said Act.

5. The learned Advocate for the respondents, on the other hand, submitted that since the notice issued by the respondents clearly required the petitioners to pay an amount of Rs.1,732.20 ps. towards the cess amount to the municipality and no evidence to establish such payment was produced by the petitioners, nor there is any finding to that effect in favour of the petitioners, no fault can be found with the findings arrived at by the lower Appellate Court about failure on the part of the petitioners to comply with their obligation under the provision of law comprised under Section 12(3)(b) of the said Act and therefore there is no case for interference in the impugned judgment.

6. The fact that the petitioners had tendered the rental amount as and when it fell due is not in dispute. In fact there is a clear statement in the notice issued by the respondents on 9-11-1976 itself that some of the cheques presented by the petitioners towards the payment of rent were not encashed by the respondents. It appears that in the course of the trial before the trial Court a lame excuse of non-exclusion of the bank charges was forwarded as being the reason for non-encashment of the said cheques. Certainly, that was not the case of the respondents in the notice served upon the petitioners. Besides, that cannot be a justification

for non-encashment of the cheques in relation to the rental amount tendered by the lessee. In case the landlord finds any shortfall in the payment made towards the rental dues by the tenant, certainly the landlord can bring the said fact to the notice of the tenant in the notice to be issued and required to be served upon the tenant in accordance with the provisions of law. It is not the case of the respondents that any such notice was served upon the petitioners in that regard. Once it is established that the petitioners had tendered the amount by way of cheques and the mode of payment of rent by way of cheque is not in dispute, certainly it would be a valid tender in relation to the amount of rent due and payable by the petitioners.

7. Considering the statement of accounts in relation to the tendering of rent, a copy of which is annexed to the reply dated 12-12-1976 which apparently discloses that by 1-10-1976 the petitioners had tendered the amount towards the period from October, 1976 to April, 1977 and prior to that the rental amount was tendered upto the period of September, 1976 on 1-4-1976 and the said fact having not been disputed by the respondents, it goes without saying that the petitioners were not in default in payment of the rental amount on the date of issuance of the notice dated 9-11-1976.

8. As regards the cess and/or the tax payable to the municipality, the said statement clearly discloses that an amount of Rs.1,106/- was paid to the municipality by the petitioners on 15-10-1976 and an amount of Rs.30/- was paid on 21-10-1976, totalling to Rs.1,136/- and the said amount was paid prior to the issuance of the notice dated 9-11-1976. Undisputedly, there is no evidence produced on record by the respondents nor there is any finding either by the trial Court or by the lower Appellate Court to the effect that any amount in excess to Rs.1,136/-, either towards the tax or cess, was due from the petitioners as on the date of issuance of the notice by the respondents to the petitioners i.e. on 9-11-1976. The contention that the petitioners ought to have proved that the amount of Rs.1,732.20 ps., as demanded under the notice, was already paid, is devoid of substance. Primarily it is for the landlord to establish that the amount claimed under the notice is in fact due and payable by the tenant and once it is prima facie established, the onus would thereafter shift to the tenant to discharge his liability in that regard. Once it is not established by the respondents that the petitioners were in fact liable to pay the sum of Rs.1,732.20 ps. towards the cess amount, as claimed by the respondents in the notice dated 9-11-1976, and the petitioners on the other hand having specifically established that the petitioners paid a sum of

Rs.1,136/- prior to the issuance of the notice towards the municipal taxes and there being no other evidence on record or finding by the Court to the effect that apart from the amount of Rs.1,136/-, any amount was required to be paid by the petitioners either towards the municipal taxes or the cess amount, the petitioners are justified in contending that on the date of issuance of the notice dated 9-11-1976 the petitioners were not in arrears either towards the rental charges or towards the tax or cess or in relation to the suit premises to the respondents/landlords. Obviously therefore, there was no occasion for the respondents for issuance of the notice dated 9-11-1976.

9. Once it is clear that there is no cause for the landlord for issuance of the notice under Section 12(2) of the said Act, the question of entertaining the eviction proceedings on the ground of default in payment of rent does not arise at all and for the same reason the question of obligation of the tenant under Section 12(3)(b) also does not arise in a proceedings initiated by the landlord without there being a cause for initiation of the eviction proceedings on the ground of default in payment of rent. The petitioners, therefore, are justified in contending that the notice issued under Section 12(2) of the said Act was bad in law ab initio and hence the impugned order for eviction of the

petitioners on the ground of the alleged failure to comply with their obligation under Section 12(3)(b) cannot be sustained.

10. In the result, therefore, the petition succeeds. The impugned order is hereby quashed and set aside. The eviction proceedings against the petitioners on the ground of default in payment of rent are hereby, therefore, quashed and the suit in that regard stands dismissed. The rule is made absolute accordingly with no order as to costs.